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Supreme Court, U.S.
FILED

97 1805 MAY 7 - 1998

OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Martin R. Stacy

Petitioner

v.

United States and its agency

The Internal Revenue Service

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 USC §§ 1330, 1602-et. seq. creates a cause of action for foreign sovereigns against foreign states for violation, not for their jure imperii activities, but for their jure gestionis activities. Petitioner filed such a case in State court against respondent which was removed to federal court and dismissed. The questions presented are:

1. Whether the district court lacked removal jurisdiction under 28 U.S.C. §§ 1441(b) and1442(a)(1) when case was dismissed from State court.

2. Whether the district court lacked personal jurisdiction under F.R.Civ P. 4 (e) and the Fifth Amendment Due Process Clause under removal action.

3. Whether the district court can upon removal, create its own service of process outside § 1608 to convert a case arising under § 1330 in State court into a diversity action pursuant to § 1331 in federal court.

LIST OF THE PARTIES

All parties appear in the caption of the case in the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Court of appeals court order, filed February 10, 1998, appears in Appendix at A-1, infra.

Court of Appeals Judgment entered April 7, 1998, appears in Appendix at A-12, infra.

District court's order, filed December 11, 1997, appears in Appendix A-3, infra.

District court's Judgment filed December 11, 1997, appears at Appendix A-5, infra

Magistrate's order, filed, November 24, 1997, appears in Appendix A-6, infra.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall be ... deprived of ... liberty, or property, without due process of law; ...

2. **28 U.S.C. 1441(b)**

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right

arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

3. **28 U.S.C. § 1442 provides:**

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1330

(a) The district court shall have original jurisdiction without regard to amount in controversy of any civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

FEDERAL RULES OF CIVIL PROCEDURE

28 U.S.C. Rule 4(e) Service Upon Individuals Within a Judicial District of the United States.

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

28 U.S.C. Rule 11 Federal Rules of Civil Procedure.
Fed. R. Civ. p. 11 provides, in part:
Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

> b) Representations to Court.
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5 , but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If

warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

28 U.S.C. 1602-1608 FOREIGN SOVEREIGN IMMUNITIES ACT

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be livied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603 Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) is an organ of a foreign state or political subdivision thereof, or a majority of whose share or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604 Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605 General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may

purport to effect except in accordance with the terms of the waiver.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon a act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

§ 1606 Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner an to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages;

§ 1608 Service

(c) Service shall be deemed to have been made—

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

STATEMENT OF THE CASE

Petitioner filed for an injunction in State court under the Foreign Sovereign Immunities Act 28 U.S.C. 1602- et. seq. (FSIA) in order to stop respondents, West Telemarketing and the Internal Revenue Service (IRS) as an agency of United States from taking petitioners property for some alleged due and owing income tax. Respondent IRS removed said case to the federal district court at which time petitioner dismissed West Telemarketing from the case without prejudice pending the settlement of the removal action.

Petitioner filed motions to remand case back to State court based upon F.R.Civ.P., 12(b), (2) and 4(e) for lack of personal jurisdiction.

The district court denied petitioner's motions and without any hearings, dismissed petitioner's case pursuant to 28 USC §§ 1441(b) and 1442(a)(1) in addition to granting sanctions.

Petitioner filed a special notice of appeal with the court of appeals. Without any filing of briefs on the part of either party, the appeals court upheld the district court's decision, thus dismissing petitioner's State case. Petitioner did not seek an in banc hearing.

REASONS FOR GRANTING THE WRIT

LOWER COURT'S REMOVAL UNDER 28 U.S.C. §§ 1442(a)(1) AND 1441(b) IS IN ERROR

In its opinion and order, the district court stated "upon good cause shown, the court hereby grants the defendant's motion and will dismiss the plaintiff's complaint for failure to state a claim", and is "barred by res judicata as same claim filed in 1995", at (A- 3), thereby upholding removal jurisdiction of petitioner's case pursuant to 28 USC § 1442(a)(1), at (A- 6), which is in total error. First, petitioner's case is not res res judicata because this is the first action petitioner filed in State court using the FSIA . Petitioner's prior action filed in the federal district court was a mistake as there was no diversity jurisdiction. See *Louisville & N.R. v. Mottley* 211 U.S. 149, 152.

Petitioner filed suit against respondent IRS as an agency and not against any of its officers. 28 USC § 1442(a)(1) confers right of removal only upon officers of United States and officers of any agency of United States who have been sued in state court for some act or conduct which such individual defendant may have allegedly taken under color of his federal office, or on account of authority claimed under federal law, and no agency of United States has any right of

removal under that section. *KCPO Employees Credit Union v. Mitchell* (1976, WD Mo) 421 F Supp 1327.

28 USC § 1442 confers right of removal only upon officers of United States and officers of any agency of United States and no agency of United States has any right of removal under § 1442. *Brewer v. Department of Housing & Urban Development* (1980, SD Ohio) 508 F Supp 72.

Environmental Protection Agency is not entitled to removal under 28 USC § 1442(a)(1), since plain wording of provision makes clear that removal is available only to officer of United States or officer of agency of United States, and not to agency itself. *Lowe v. Norfolk & W.R. Co.* (1982, SD Ill) 529 F Supp 491, with by multiple cases as stated in *AMF, Inc. v. Victor J. Andrew High School* (1st Dist) 172 Ill App 3d 337, 122 Ill Dec 325, 526 NE2d 584).

State court action brought against EPA was improperly removed to federal District Court under 28 USC § 1442 (a)(1), since EPA was sued only as agency and no recovery is sought from individual officials. *Alma v. Bell, Galyardt & Wells, Inc.* (1985, DC Neb) 606 F Supp 686.

28 U.S.C. § 1441(b)

Additionally, the district court asserts to have original jurisdiction over petitioner's cause under 28 USC 1441(b) and, as a federal tax issue (A-6), is also in error because the district court never established that it had personal jurisdiction over petitioner to effect the removal action conferred by 28 U.S.C.§ 1441(b).

Where there is no diversity of citizenship between the parties, ... the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of United States district courts under 28 U.S.C. § 1331 (1976 ed., Supp. V). Under the "well-pleaded complaint" rule, a defendant may not remove such a case to federal court unless the plaintiff's complaint establishes that the case "arises under" federal law within the meaning of § 1331, and it may not be removed on the basis of a federal defense, including the defense of preemption, ... To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 9, 10, 11 (1983). Petitioner's casue of action being §§ 1330, 1602 et. seq. in State court.

The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Gully v. First Nat Bank* , 299 U.S. 13; *Verlinden B.V. v. Central Bank of Nigeria* , 461 U.S. 492.

(1) In petitioner's view, the express provisions of the FSIA provide the exclusive framework within which the courts, and in this case, the State court of Nebraska is to resolve a foreign sovereign's claim against a foreign state for its jure gestionis activities, and (2) within that framework, recognition of the foreign state's jure imperii powers is to be

the rule, subject only to such exceptions as are expressly provided in the statute.

> "... a suit against a foreign state under [the FSIA] necessarly raises questions of substantive federal law at the very outset, and hense clearly 'arises under' federal law, as that term is used in Art. III." *Verlinden Id.*

Petitioner therefore urges that the jurisdictional ruling below be reversed in the first instance on the ground that it is in violation of established principles of law under §§ 1442 (a)(1), 1441(b), 1447(c) and 1331.

LOWER COURT'S RULINGS UNDER DIVERSITY JURISDICTION AND 28 U.S.C. § 1331 IN CONFLICT WITH PLAINTIFF'S ARTICLE III "ARISING UNDER" § 1330 CASE IN STATE COURT

Petitioner did not file his complaint in State court pursuant to federal law, i.e., 28 U.S.C. § 1331 and its "well pleaded complaint rule", but pursuant to 28 USC §§ 1330, 1602 et seq. It is not and cannot be suggested that there was any ground of jurisdiction under diversity. See *Louisville & N. R. v. Mottley*, supra, 211 U.S. 149, 152. The FSIA is a substantive rule of law unrelated to federal jurisdiction. See, e.g., *Berizzi Brothers v. Steamship Pesaro*, 271 U.S. 562 (1926). House Report, No. 94-1487, 94th Cong. 2nd Sess. (1975) reprinted in [1976] U.S.Code Cong. & Admin. News. at 13; see 28 U.S.C. § 1602 (1976).

"... diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs since a foreign plaintiff is not 'a State, or [a] Citize[n] thereof." See *Mossman v. Higginson*, 4 Dall. 12

(1800). "We conclude, however, that the 'Arising Under' Clause of Art. III provides an appropriate basis for the statutory grant of subject-matter jurisdiction to actions by foreign plaintiffs under the Act." *Verlinden B.V. v. Central Bank of Nigeria*, supra, 461 U.S. at 492.

"The controlling decision on the scope of Art. III "arising under" jurisdiction is *Osborn v. Bank of United States*, 9 Wheat. 738 (1824), quoted in *Verlinden* at 492. In *Osborn* the Court concluded that the "judicial department may receive... the power of construing every law" that "the Legislature may constitutionally make," id., at 818. The rule was laid down that

> "it [is] a sufficient foundation for jurisdiction within the meaning of the "arising under" clause of Article III §2 clause 1 when the title or right set up by the party may be defeated by one construction of the Constitution or law[s] of the United States and sustained by the opposite construction." Id, at 822.

Osborn thus reflects a broad conception of "arising under" jurisdiction, according to which Congress may confer on State courts jurisdiction over any case or controversy that might call for the application of federal law.

This Court in *Verlinden B.V. v. Central Bank of Nigeria*, supra. at 494 stated:

> "Although the language of § 1331 parallels that of the "Arising Under" Clause of Art. III, this Court never has held that statutory "arising under" jurisdiction is identical to Art. III "arising under" jurisdiction. Quite the contrary is true. Section 1331, the general federal-question statute, although broadly phrased,

> has been continuously construed and limited in the light of the history that produced it, ... *It is a statute, not a Constitution, we are expounding.*" *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (emphasis added)."

"... every action against a foreign sovereign necessarly involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Art. III." *Verlinden*, at 497.

THE LOWER COURT HAS IGNORED THE FEDERAL RULES OF CIVIL PROCEDURE IN TOTAL DISREGARD OF A GOVERNING ACT OF CONGRESS, IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT

"Before a court may exercise personal jurisdiction over defendant there must be more than notice to defendant and a constitutionally sufficient relationship between defendant and the forum. There also must be a basis for defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on defendant." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 US 97 (1987).

Under Rule 4(e) of F.R.Civ.P., a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction. *Omni* Id. Thus, there must be a legislative grant of authority for a federal court to exercise service of summons. See e. g., *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 467-468 (1945)Omni, Id. Since Title 26 does

not contain its own service of process authorization, and from the decisions of this court concerning Rule 4(e), the lower court is bound to follow Nebraska's long arm statute which reads:

> 25-536 Jurisdiction over the person. A court may exercise personal jurisdiction over a person:
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of United States.

Petitioner maintains that he is not subject to service of process under Nebraska's long-arm statute because he is not purposefully engaged in forum based activities. See *Lorelie v. Guadalupe*, 940 F.2d 718 (1st Cir. 1991).

Petitioner has no beneficiary nexus including but not limited to a trust res with the United States or the State of Nebraska in their jure gestionis forum, and no foundation has been established in evidence by the lower court, or any document purporting to establish such a nexus to disprove petitioner's Affidavit that petitioner has no contact ties or relations in respondent's jure gestionis forum whereby petitioner waived his 9th and 10th Amendment rights under the Constitution (A- 13), in addition to the rule that the lower federal courts are courts of limited jurisdiction and may not exercise any powers not expressly conferred upon them by Congress. *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982); *Cary v. Curtis*, 3 How. (44 U.S.) 236, 245 (1845).

"Since Congress concededly has the power to limit service of process, circumspection is called for in going beyond what Congress has authorized. Second, as statutes and rules have always provided the measures for service, courts are inappropriate forums for deciding whether to extend them." *Omni Capital Int'l v. Rudolf Wolff & Co.*, supra. That from the decision of the *Omni* Court, it appears the lower court fashioned its own service of process, therefore, is without personal jurisdiction over petitioner, thus, the district court's presumption that petitioner owes income taxes, (A-6) is totally misplaced, because the issue is not taxes but whether the lower courts had personal jurisdiction in order to perfect removal to respondent's jure gestionis forum. There is no presumption in favor of jurisdiction and the basis for jurisdiction must be affirmatively shown. *Hartford v. Davis*, 163 U.S. 273.

Additionally, the district court ignores the facts that 28 U.S.C. §§ 1330, 1602, authorizes suits in State courts against foreign sovereigns under the FSIA, not for their jure imperii acts, but, for their jure gestionis acts and is to be interpreted according to the principles of international law which supersedes all other federal and state law.

The restrictive theory of immunity as it developed in customary international law and as it was adopted by Congress in the FSIA, distinguishes between "governmental or sovereign" activities engaged in by the states *jure (imperii)* and their private law activities—activities of the kind that may also be carried on by private persons (*jure gestionis*). *Restatement (Third)* supra, § 451. It is the

essence of the restrictive theory to "restrict" or limit the jurisdictional immunity of foreign states to acts *jure imperii* and to deny immunity for acts *jure gestionis*.

THE LOWER COURTS RULING THAT PERSONAL JURISDICTION OVER PETITIONER MAY BE ASSERTED IN THIS CASE IS IN CONFICT WITH THE DUE PROCESS CLAUSE AND APPLICABLE DECISIONS OF THIS COURT

The requirement that a court have in personam jurisdiction over a defendant before it can render a valid judgment personally binding on him "flows ... from the Due Process Clause." *Insurance Corp. v. Compagnie des Bauxites,* supra, 456 U.S. 694, 702 (1982). This restriction on judicial power "recognizes and protects an individual liberty interest." Id. Consequently, it is settled constitutional doctrine that before a court may exercise personal jurisdiction over a nonresident defendant, it must be shown that the defendant has "certain minimum contacts" with the forum so that maintenance of the suit would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington* 326 U.S. at 316.* *Hanson v. Denckla*, 357 U.S. 235 (1958), made it even more explicit that it is the defendant's, not the plaintiff's contacts with the forum which are pivotal to a Due Process analysis:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State ... [I]t is

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* In enacting the FSIA, Congress expressly incorporated the Due Process principles enunicated in International Shoe, H.R. Rep. 94—1497 [1975] U.S. Code Cong. & Admin. News at 6612.

> essential that in each that there be some act by which the *defendant* purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253 (emphasis added). In 1984, the Court reaffirmed the Hanson doctrine when it stated: Nor may the defendant's contacts "result solely from the 'unilateral activity of another party.'" *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 417, (1984). See also *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72 (1985); *World Wide Volkswagen Corp. v. Woodsen,* 444 U.S. 286, 298 (1980). *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. __, 107 S. Ct. 1026, 1033 (1987), the Court reemphasized that, for Due Process purposes, the affiliating connection beetween the forum state and the nonresident defendant "must come about *by an action of the defendant purposefully directed towards the forum state*" (emphasis added).

In sum, there is a total absence of the application of the terms of removal jurisdiction and personal jurisdiction in respondent's gestionis forum, thus rendering the district court's decision patently invalid as a matter of federal law, and the binding precedents of this Court.

The district court has so far departed from the accepted and usual course of judicial proceedings to call for the exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: May 5, 1998

Respectfully submitted,

Martin R. Stacy

Martin R. Stacy pro se
702 Hickory
Omaha, NE 68108
402 342 6526

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

NO. 98-1128NE

Martin R. Stacy,

Appellant,

v.

United States of America,

Appellee

Submitted: February 5, 1998
Filed: February 10, 1998

Before FAGG, BEAM, and HANSEN, Circuit Judges.

PER CURIAM.

Martin R. Stacy appeals the district court's order granting the Government's motion to dismiss for failure to state a claim. Having carefully reviewed the record, we conclude the judgment of the district court was clearly correct. Accordingly, we affirm. See 8th Cir. R. 47A(a).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MARTIN R. STACY,

Plaintiff,

8:97CV477

v.

UNITED STATES OF AMERICA.

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Defendant's Motion to Dismiss (filing 9). In addition, the Plaintiff has filed objections to the Magistrate's Judge's Order which denied the Plaintiff's Motion to Remand (filing 6). Upon good cause shown, the Court hereby grants the Defendant's Motion and will dismiss the Plaintiff's Complaint for failure to state a claim.

The 'Court also finds that the Plaintiff's Complaint is barred by the doctrine of res judicata. The Plaintiff's current claim presents the identical issue as a claim filed by the Plaintiff in 1995. The recurring theme is that the Federal Sovereign Immunities Act (28 U.S.C. § 1602, *et seq.*) bars the United States from collecting federal income taxes owed by the Plaintiff. The Plaintiff's earlier complaint advancing this errant proposition was dismissed by Judge Strom with prejudice on March 22, 1996, and said dismissal was affirmed by the Eight Circuit on December 13, 1996.

Therefore, pursuant to 28 U.S.C. § 2412, this Court will also award to the United States, in separate judgment, its costs for defending this action.

Finally, after consideration of the Plaintiff's objections to the Magistrate Judge's Order, said objections are overruled.

IT IS SO ORDERED:

1. That the Plaintiff's objections (filing 12) to the Magistrate Judge's Order are overruled;

2. That the Defendant's Motion is Dismiss (filing 9) is granted;

3. That the Plaintiff's Complaint (filing 1) is dismissed with prejudice; and

4. That the United States of America shall be awarded its costs for defending this action.

DATED this 11th day of December, 1997.

BY THE COURT:

/s/_____

WILLIAM G. CAMBRIDGE, Chief Judge

United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARTIN R. STACY,

Plaintiff

8:97CV477

v.

UNITED STATES OF AMERICA.

Defendant

JUDGMENT

In accordance with the memorandum opinion and order entered herein on this date, it is ordered that this action is dismissed with prejudice with costs to the Defendant.

DATED this 11th day of December, 1997.

BY THE COURT:

/s/_____

WILLIAM G. CAMBRIDGE, Chief Judge

United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARTIN R. STACY,

Plaintiff,

8:97CV477

v.

UNITED STATES OF AMERICA.

Defendant.

This matter is before me pursuant to 28 U.S.C. § 636 and the general order of referral on plaintiff's motion to remand this case to Nebraska state court (#6).

Plaintiff filed this action in state court in August 1997, protesting the "confiscation" of his wages by the United States of America, acting through the Internal Revenue Service (IRS). The state court petition alleged that plaintiff resides in Omaha, Nebraska and that the defendants[1] "have no jurisdiction" over him and his property "because plaintiff is not subject to the local laws of the several states of the United States because he has no beneficiary nexus with defendants' jure gestionis forum." Plaintiff seeks a declaration to this effect and an injunction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1608 (FSIA).

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[1] Plaintiff has voluntarily dismissed West Telemarketing Company as a defendant.

The case was timely removed to federal court by the United States pursuant to 28 U.S.C. § 1442.[2] Plaintiff has filed a motion to remand the case to state court, contending that this court does not have personal jurisdiction over him because, under the FSIA, he is not subject to the revenue laws of the United States. The government opposes the motion and, in its brief, requests an award of attorney's fees and sanctions incurred in responding to plaintiff's motion to remand.

Any action over which federal district courts have original jurisdiction which arises under the laws of the United States may be removed to federal district court. See 28 U.S.C. § 1441(b).

Federal district courts have original jurisdiction over civil actions against the United States seeking recovery of wrongfully collected federal taxes. This action was properly removed to federal court.

COSTS AND SANCTIONS

The government's request for costs and sanctions is based on this court's disposition of plaintiff's earlier case, Stacy v. United States, case No. 8:95CV559, in which the

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[2] Section 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

plaintiff contended he was not subject to the local laws of the several states of the United States. In a particularly clear and succinct memorandum filed July 22, 1996, Judge Strom ruled against the plaintiff on this issue:

> This is the third time the court has addressed this issue. Plaintiff essentially claims that the defendant has no jurisdiction or authority over plaintiff or his property because the plaintiff is not subject to the local laws of the several states of the United States because he has no beneficiary nexus with defendant's forum in the State of Nebraska under limited liability for the payment of debt and perpetual succession. He claims that he is entitled to the immunity granted to foreign states set forth in 18 U.S.C. § 1602, et seq. He is not.

Plaintiff's appeal of this ruling was denied by the Eight Circuit Court of Appeals on December 13, 1996 in case No. 96-3136NEO.

In the previous action, plaintiff was put on notice that he is indeed subject to the revenue laws of the United States. I therefore find that his argument to the contrary, advanced in this case in support of the motion to remand, is frivolous and violates Fed. R. Civ. P. 11(b)(1), (2), and (3).[3]

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[3] Fed. R. Civ. p. 11 provides, in part:
Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

b) Representations to Court.

By presenting to the court (whether by signing, filing, submitting, or later
advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge,
information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to
cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by
existing law or by a nonfrivolous argument for the extension, modification, or
reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if
specifically so identified, are likely to have evidentiary support after a reasonable
opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that
subdivision (b) has been violated, the court may, subject to the conditions stated
below, impose an appropriate sanction upon the attorneys, law firms, or parties
that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately
from other motions or requests and shall describe the specific conduct alleged to
violate subdivision (b). It shall be served as provided in Rule 5 , but shall not be
filed with or presented to the court unless, within 21 days after service of the
motion (or such other period as the court may prescribe), the challenged paper,
claim, defense, contention, allegation, or denial is not withdrawn or appropriately

Defendant's request for costs was made in its brief opposing the motion to remand. Motions for Rule 11 sanctions, however, "shall be made separately from other motions or requests." In light of the procedural requirements of Rule 11(c), I reluctantly conclude that an award of sanctions cannot be entered at this time. Compare United States v. Gerads, 999 F.2d 1255 (8th Cir. 1993), cert denied, 510 U.S. 1193 (1994) (government's motion for $1,500 in sanctions granted by Court of Appeals pursuant to 28 U.S.C. § 1912 and Federal Rule of Appellate Procedure 38).

Pursuant to NELR 72.3 any appeal of this order shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this order. Failure to timely appeal may constitute a waiver of any such objection. The brief in support of any appeal shall be delivered to the Hon. William G. Cambridge at the time of filing such appeal.

DATED this 24th day of November, 1997.

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corrected. If warranted, the court may award to the party prevailing on the motion
the reasonable expenses and attorney's fees incurred in presenting or opposing the
motion. Absent exceptional circumstances, a law firm shall be held jointly
responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order
describing the specific conduct that appears to violate subdivision (b) and directing
an attorney, law firm, or party to show cause why it has not violated subdivision
(b) with respect thereto.

BY THE COURT

/S/_____

Kathleen A. Jaudzemis
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

NO. 98-1128NE

Martin R. Stacy,

Appellant,

v.

United States of America,

Appellee

Appeal form the United States District Court for the District of Nebraska

This appeal from the United States Dsitrict Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judjment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 10, 1998

Atrue copy:
ATTEST: /s/ Michael E.Gans

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

MANDATE ISSUED April 7, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARTIN R. STACY,

Plaintiff,

8:97CV477

v.

UNITED STATES OF AMERICA, AND
WEST TELEMARKETING
CORPORATION,

Defendants

AFFIDAVIT

I, Martin R. Stacy do solemnly swear, affirm, declare attest and depose on this the 24th day of October, 1997.

1. That I am of lawful age and am competent to make this Affidavit.

2. That I have personal knowledge of the facts stated herein and that he Martin R. Stacy has not entered into any beneficiary economic nexus with the United States or the State of Nebraska in its jure gestionis capacity.
/s/ Martin R. Stacy 10/24/97

Signed and sworn to before me on this the 24th day of October, 1997.

My commission expires
Nov. 16, 1998
General Notary-State of Nebraska
Janice I. Holt
My Comm. Exp. Nov. 16, 1998